

(6) An employee who holds a position with the Veterans Health Administration which has been excluded from the competitive service by or under a provision of title 38, United States Code, unless such employee was appointed to such a position under section 7401(3) of title 38;

(7) An administrative law judge appointed under 5 U.S.C. 3105;

(8) An individual in the Senior Executive Service;

(9) An individual appointed by the President;

(10) An employee occupying a position in Schedule C as authorized under part 213 of this chapter;

(11) A reemployed annuitant;

(12) A technician in the National Guard described in 5 U.S.C. 8337(h)(1), employed under section 709(b) of title 32;

(13) An individual occupying a position in the excepted service for which employment is not reasonably expected to exceed 120 calendar days in a consecutive 12 month period; and

(14) A manager or supervisor returned to his or her previously held grade pursuant to 5 U.S.C. 3321 (a)(2) and (b).

[54 FR 26179, June 21, 1989, as amended at 57 FR 10125, Mar. 24, 1992; 57 FR 20042, May 11, 1992; 58 FR 13192, Mar. 10, 1993; 58 FR 65533, Dec. 15, 1993]

#### § 432.103 Definitions.

For the purpose of this part—

(a) *Acceptable performance* means performance that meets an employee's performance requirement(s) or standard(s) at a level of performance above "unacceptable" in the critical element(s) at issue.

(b) *Critical element* means a work assignment or responsibility of such importance that unacceptable performance on the element would result in a determination that an employee's overall performance is unacceptable.

(c) *Current continuous employment* means a period of employment or service immediately preceding an action under this part in the same or similar positions without a break in Federal civilian employment of a workday.

(d) *Opportunity to demonstrate acceptable performance* means a reasonable chance for the employee whose per-

formance has been determined to be unacceptable in one or more critical elements to demonstrate acceptable performance in the critical element(s) at issue.

(e) *Reduction in grade* means the involuntary assignment of an employee to a position at a lower classification or job grading level.

(f) *Removal* means the involuntary separation of an employee from employment with an agency.

(g) *Similar positions* mean positions in which the duties performed are similar in nature and character and require substantially the same or similar qualifications, so that the incumbents could be interchanged without significant training or undue interruption to the work.

(h) *Unacceptable performance* means performance of an employee that fails to meet established performance standards in one or more critical elements of such employee's position.

[54 FR 26179, June 21, 1989, as amended at 54 FR 49076, Nov. 29, 1989; 55 FR 25950, June 26, 1990; 57 FR 23045, June 1, 1992; 57 FR 60717, Dec. 22, 1992; 58 FR 65534, Dec. 15, 1993; 60 FR 43946, Aug. 23, 1995]

#### § 432.104 Addressing unacceptable performance.

At any time during the performance appraisal cycle that an employee's performance is determined to be unacceptable in one or more critical elements, the agency shall notify the employee of the critical element(s) for which performance is unacceptable and inform the employee of the performance requirement(s) or standard(s) that must be attained in order to demonstrate acceptable performance in his or her position. The agency should also inform the employee that unless his or her performance in the critical element(s) improves to and is sustained at an acceptable level, the employee may be reduced in grade or removed. For each critical element in which the employee's performance is unacceptable, the agency shall afford the employee a reasonable opportunity to demonstrate acceptable performance, commensurate with the duties and responsibilities of the employee's position. As part of the employee's opportunity to demonstrate acceptable performance, the agency

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shall offer assistance to the employee in improving unacceptable performance.

[55 FR 25950, June 26, 1990, as amended at 58 FR 65534, Dec. 15, 1993]

### § 432.105 Proposing and taking action based on unacceptable performance.

(a) *Proposing action based on unacceptable performance.* (1) Once an employee has been afforded a reasonable opportunity to demonstrate acceptable performance pursuant to § 432.104, an agency may propose a reduction-in-grade or removal action if the employee's performance during or following the opportunity to demonstrate acceptable performance is unacceptable in 1 or more of the critical elements for which the employee was afforded an opportunity to demonstrate acceptable performance.

(2) If an employee has performed acceptably for 1 year from the beginning of an opportunity to demonstrate acceptable performance (in the critical element(s) for which the employee was afforded an opportunity to demonstrate acceptable performance), and the employee's performance again becomes unacceptable, the agency shall afford the employee an additional opportunity to demonstrate acceptable performance before determining whether to propose a reduction in grade or removal under this part.

(3) A proposed action may be based on instances of unacceptable performance which occur within a 1 year period ending on the date of the notice of proposed action.

(4) An employee whose reduction in grade or removal is proposed under this part is entitled to:

(i) *Advance notice.* (A) The agency shall afford the employee a 30 day advance notice of the proposed action that identifies both the specific instances of unacceptable performance by the employee on which the proposed action is based and the critical element(s) of the employee's position involved in each instance of unacceptable performance.

(B) An agency may extend this advance notice period for a period not to exceed 30 days under regulations prescribed by the head of the agency. An

agency may extend this notice period further without prior OPM approval for the following reasons:

(1) To obtain and/or evaluate medical information when the employee has raised a medical issue in the answer to a proposed reduction in grade or removal;

(2) To arrange for the employee's travel to make an oral reply to an appropriate agency official, or the travel of an agency official to hear the employee's oral reply;

(3) To consider the employee's answer if an extension to the period for an answer has been granted (e.g., because of the employee's illness or incapacitation);

(4) To consider reasonable accommodation of a handicapping condition;

(5) If agency procedures so require, to consider positions to which the employee might be reassigned or reduced in grade; or

(6) To comply with a stay ordered by a member of the Merit Systems Protection Board under 5 U.S.C. 1208(b).

(C) If an agency believes that an extension of the advance notice period is necessary for another reason, it may request prior approval for such extension from the Chief, Family Programs and Employee Relations Division, Office of Labor Relations and Workforce Performance, Personnel Systems and Oversight Group, Office of Personnel Management, 1900 E Street NW., Washington, DC 20415.

(ii) *Opportunity to answer.* The agency shall afford the employee a reasonable time to answer the agency's notice of proposed action orally and in writing.

(iii) *Representation.* The agency shall allow the employee to be represented by an attorney or other representative. An agency may disallow as an employee's representative an individual whose activities as a representative would cause a conflict of interest or position or an employee whose release from his or her official position would give rise to unreasonable costs to the Government or whose priority work assignment precludes his or her release from official duties.

(iv) *Consideration of medical conditions.* The agency shall allow an employee who wishes to raise a medical condition which may have contributed